UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH P. ANNALORO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-252-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges disability stemming from depression, anxiety, degenerative disc disease and disc herniation, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 21, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff's allegations regarding his limitations were not totally credible for reasons set forth in the body of the decision, Finding 5, Record at 29; that he retained the residual functional capacity ("RFC") to lift and carry twenty pounds occasionally and ten pounds frequently, sit for six hours and stand and/or walk for six hours during an eight-day workday if able to sit and stand at will, and occasionally stoop, kneel, crouch, crawl and climb ramps and stairs, although he could never climb ladders, ropes or scaffolds and needed to avoid concentrated exposure to vibration and hazards such as machinery and heights, Finding 7, *id*.; that although he could not perform the full range of light work, using Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") as a framework for decision-making, he could perform a significant number of jobs in the national economy, including security guard, mail clerk, office helper, toll collector, cashier, auto photo-machine operator and storage-facility rental clerk, Finding 13, *id*. at 29-30; and that he therefore had not been under a disability at any time through the date of decision, Finding 14, *id*. at 30.[2] The Appeals Council declined to review the decision, *id*. at 8-10, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through the *(continued on next page)*

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff argues that the administrative law judge erred in (i) finding his activities of daily living and social functioning to be only mildly restricted, (ii) deeming his testimony regarding his activities of daily living to be inconsistent with other evidence of record, (iii) determining that his assertion that a treating physician had limited him in certain respects was inconsistent with the evidence of record, and (iv) according little weight to a revised RFC assessment by treating physician J. Scott Patch, M.D. *See generally* Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8). I find no reversible error.

I. Discussion

A. Activities of Daily Living, Social Functioning

The plaintiff first takes issue with the finding that his social functioning and activities of daily living were only mildly impaired, asserting that the administrative law judge erred in crediting the report of a non-treating consultant (Roger S. Zimmerman, Ph.D.) while failing to analyze the reports and notes of treating source Gregory C. Romanoff, M.S.Ed., L.S.W., R.A.D.C. *See id*. at 1; Record at 25, 191-95 (Zimmerman report), 231 (Romanoff letter dated September 18, 2001 indicating that plaintiff's prognosis was "poor to guarded"), 254 (Romanoff letter dated November 8, 2001 stating that plaintiff had reported

date of decision, *see* Finding 1, Record at 28, there was no need to undertake a separate SSD analysis.

that his "anger forces him to isolate himself from the community in order to avoid physical confrontations" and that he was "suspicious of all people except his daughter and his mother;" opining, "[I]t is apparent that his level of social functioning is minimal").

I find no error. A licensed social worker is not among practitioners recognized as an "acceptable medical source[] to establish whether [a claimant has] a medically determinable impairment(s)[.]" 20 C.F.R. §§ 404.1513(a), 416.913(a). While an administrative law judge "may" take evidence from other sources into consideration in assessing a claimant's RFC, *see id.* §§ 404.1513(d), 416.913(d), inasmuch as appears no particular level of deference, analysis or discussion is due that evidence, *see id.* §§ 404.1527(a)(2) & (d), 416.927(a)(2) & (d) (detailing how commissioner must weigh "medical opinions," defined as opinions from "acceptable medical sources"); *see also, e.g., Evans v. Barnhart*, 92 Soc. Sec. Rep. Serv. 568, 573-74 (D.N.H. 2003) ("[W]hile § 404.1513(d) provides that the Commissioner may use evidence from 'other sources' [such as a nurse practitioner] to evaluate the severity of a claimant's impairment, the language of that provision is permissive rather than mandatory. In other words, it is not at all clear that the ALJ was under any obligation to consider Nurse Thomas's RFC questionnaire.").[3] By contrast Dr. Zimmerman, although a Disability Determination Services ("DDS") consultant rather than a treating practitioner, was an "acceptable medical source." *See* 20 C.F.R. §§ 404.1513(c), 416.913(c), 404.1527(f)(2), 416.927(f)(2).[4]

[3] In addition, as counsel for the commissioner observed at oral argument, Romanoff evidently considered completion of a "psychiatric review" form beyond the scope of his credentials. *See* Record at 252.

[4] The Record also contains reports by DDS non-examining psychologists Thomas A. Knox, Ph.D., and David R. Houston, Ph.D., finding the plaintiff's activities of daily living and social functioning to be only mildly restricted *See* Record at 219, 242. While the administrative law judge did not expressly rely on these reports in crafting his mental RFC, *see id.* at 22-23, 25, both Drs. Knox and Houston were, like Dr. Zimmerman, "acceptable medical sources," *see* 20 C.F.R. §§ 404.1513(c), 416.913(c), both had the benefit of Dr. Zimmerman's report, *see* Record at 221, 244, and Dr. Houston had the benefit of Romanoff's September 18, 2001 letter, *see id.* at 244.

The administrative law judge accordingly did not err in crediting the report of Dr. Zimmerman while omitting to analyze social worker Romanoff's reports and notes.

At oral argument, counsel for the plaintiff raised a further, related point: that the administrative law judge erroneously construed the Zimmerman report as supporting a finding of only mild restrictions when, in fact, Dr. Zimmerman gave the plaintiff a Global Assessment of Functioning ("GAF") score (51-60) that correlates with the existence of moderate restrictions. *See* Record at 200.[5] The plaintiff's counsel acknowledged that the DDS non-examining experts, Drs. Knox and Houston, found only mild restrictions, but he characterized those findings as against the weight of the evidence. I am not persuaded.

The plaintiff's argument presupposes that a GAF in the "moderate" range is inherently inconsistent with a finding of mild, or non-severe, mental impairment.[6] He does not cite, nor can I find, authority to that effect. The DSM-IV definition makes clear that such a rating can mean either that a person has moderate symptoms or moderate difficulty in social, occupational or school functioning. Thus, moderate symptoms do not necessarily result in moderate deficits in occupational and social functioning. Indeed, the administrative law judge essentially accurately described Dr. Zimmerman as having found "no meaningful" restrictions in the plaintiff's ability to work. *Compare id*. at 25 *with id*. at 199 ("Despite any impairments noted and based upon these evaluation results, claimant appears to be able to perform such basic job-related

[5] A GAF score represents "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed., text rev. 2000) ("DSM-IV-TR"). The GAF score is taken from the GAF scale, which "is to be rated with respect only to psychological, social, and occupational functioning." *Id.* The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id*. at 34. A GAF score in the range of 51 to 60 represents "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." *Id*. (boldface omitted).

[6] A mental impairment generally is considered non-severe for purposes of Step 2 if the degree of limitation in three functional areas – activities of daily living, social functioning, and concentration, persistence or pace – is rated as "none" or "mild" and there have been no episodes of decompensation. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1).

psychological skills as understanding, communicating, concentrating and following instructions. He shows some degree of deficit in his short-term auditory memory. Problem areas as regards job functioning are likely to include the claimant's ability to interact with others in a smooth fashion, and he may have particular problems relating to those in a supervisory capacity.").

In sum, I find no error in the administrative law judge's construction of the Zimmerman report.

B. Inconsistency Between Records, Testimony

At hearing, the plaintiff testified that his nine-year-old daughter helped him with many activities of daily living, including cooking and putting his shoes on a stand so he does not have to bend over in the morning. *See id*. at 47-48. The administrative law judge found this testimony inconsistent with other evidence of record, *see id*. at 25-26, specifically, prior reports by the plaintiff (i) on November 14, 2000 that he was fully capable of caring for his daughter, *see id*. at 156, (ii) on March 30, 2001 that he cooked for his daughter, shopped, paid bills, watched television, played guitar and played with his daughter, *see id*. at 141-43, (iii) on May 23, 2001 that he shopped, cooked, did laundry and played guitar, *see id*. at 193, and (iv) on April 25, 2002 that he walked three miles a day, *see id*. at 267.

The plaintiff posits that there is no inconsistency inasmuch as none of the reports on which the administrative law judge relied addressed how the plaintiff approached the tasks in question, *e.g*., whether he lay down because of pain during the course of his chores or whether his daughter helped. *See* Statement of Errors at 2. This plaint is without merit. To the extent that the reports omitted mention of need of help, the administrative law judge reasonably construed them as indicating that the plaintiff could perform the tasks in question independently.[7] He then supportably found the records in question inconsistent with the

[7] No reason appears why the plaintiff could not have explained his need for help in making the reports in question.

plaintiff's hearing testimony. Contrary to the suggestion of the plaintiff's counsel at oral argument, the administrative law judge had no affirmative obligation to contact counsel to obtain further information (*e.g.*, the details of how the plaintiff did the walking) before attaching significance to the documented fact that he could walk three miles.

C. Inconsistency Between Records, Reconsideration Report

In a reconsideration report dated August 7, 2001 the plaintiff was asked, *inter alia*: "Have any restrictions been placed on you by a physician since you filed your claim? If 'Yes,' give name, address, and telephone number of the physician and show what kinds of restrictions have been imposed." Record at 148. The plaintiff indicated that Joel Kase, D.O., had restricted him from prolonged sitting or standing or from lifting more than ten pounds. *See id*. The administrative law judge found that report inconsistent with Dr. Kase's progress notes, in turn finding that this and other perceived inconsistencies bore negatively on the plaintiff's credibility. *See id*. at 26.

The plaintiff does not contest that the purported restriction is in fact absent from Dr. Kase's notes of record. *See* Statement of Errors at 2. Instead, he suggests that Dr. Kase imposed the restriction only orally and that he (the plaintiff) answered the reconsideration question accurately inasmuch as it did not indicate that any such restriction had to be reflected in writing. *See id.* Accordingly, he reasons, the administrative law judge found an inconsistency where there was none. *See id.*

This point of error again is without merit. While it is certainly possible that Dr. Kase gave such an oral restriction, there is no affirmative evidence that he did (for example, an affidavit of Dr. Kase or even the plaintiff's sworn testimony). In the absence of any such affirmative evidence, the administrative law judge reasonably presumed that had Dr. Kase imposed such a restriction, he would have reflected it in his progress notes. It was not there. *See* Record at 156-66. The administrative law judge therefore

supportably perceived an inconsistency between this portion of the plaintiff's reconsideration report and the evidence of Record.

D. Dr. Patch's RFC Assessment

In his fourth and final point of error, the plaintiff asserts that the administrative law judge erred in giving "little weight" to treating physician Dr. Patch's RFC assessment of June 25, 2002, instead substituting his own opinion. *See* Statement of Errors at 2-3. I am unpersuaded.

The weight to which a treating physician's opinion is entitled depends in part on the subject matter addressed. Determinations regarding RFC and disability are reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to these matters. *See* 20 C.F.R. §§ 404.1527(e)(1)-(3), 416.927(e)(1)-(3). Nonetheless, such an opinion is entitled to consideration based on six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) supportability – *i.e.*, adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. *Id.* §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6); Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-5p"), at 124 ("In evaluating the opinions of medical sources on issues reserved to the Commissioner, the adjudicator must apply the applicable factors in 20 CFR 404.1527(d) and 416.927(d)."). Regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

The administrative law judge discounted the June 25, 2002 Patch RFC assessment on the bases that it was not well-supported or adequately explained and was inconsistent with Dr. Patch's own treatment notes and previous opinions. *See* Record at 24. The plaintiff complains that this assessment is itself "unsupported" inasmuch as "it fails to identify the treatment notes and statements that are alleged to be inconsistent" and wrongly harps on inconsistency when that inconsistency was "exactly the point. Dr. Patch acknowledged and corrected his mistake." Statement of Errors at 3.

Nonetheless, while the administrative law judge did not provide elaborate reasons for his handling of the June 25, 2002 RFC, I find that he gave sufficiently "good reasons" to pass muster. As the administrative law judge noted, *see* Record at 24, Dr. Patch completed an RFC assessment on May 6, 2002 in which he opined, *inter alia*, that the plaintiff could occasionally lift up to fifty pounds, could stand and walk for about six hours in an eight-hour workday and had no restrictions on sitting, *see id*. at 273-74. Dr. Patch explained this assessment on the basis that examination had revealed minimal tenderness, and an MRI had shown only a mild disc bulge at L5-S1. *See id*. at 274. This, in turn, was consistent with a detailed medical report dated April 25, 2002, in which Dr. Patch stated, *inter alia*:

> Chronic back pain off + on for many years. Located across low back + occ into legs. MRI in past showed disc bulge + degeneration @ L5-S1. Pain initially with ambulation. Was lying on couch a lot. Pain most recently improving with ambulation. At last visit, he reported being able to walk 3 miles with some pain afterwards.

Id. at 269; *see also id*. at 270-72 (summarizing findings on previous visits, results of diagnostic tests).

By letter dated June 25, 2002 Dr. Patch substantially revised his RFC assessment, stating:

> In my most recent assessment of Joseph, I feel that I was over optimistic as to his functionality. I have reviewed his previous physical therapy and back examinations.
>
> Given this review, I have the following recommendations:
>
> No lifting more than 30 pounds.

> No repetitive bending, twisting, or extending of his back[.]
> No standing for longer than 20 minutes per hour.
> No sitting for longer than 30 minutes per hour.
> No walking for more than 15 minutes per hour.
>
> I feel that the maximum daily work at this time is likely 4 hours.
>
> Furthermore, a review of his Physical Therapy records demonstrates that significant progress in his symptoms could be made if he was compliant with his care plan.

Id. at 277. While Dr. Patch explained the basis for his revision – his review of previous physical therapy and back examinations – the administrative law judge supportably found it lacking in foundation and inadequately explained given Dr. Patch's utter lack of rationale for the specific limitations reached (including the limitation to the four-hour workday) or for the significant disparity between the revised assessment and his earlier, seemingly well-supported views.[8]

One more point remains to be addressed. At oral argument, the plaintiff's counsel asserted that, at the least, the administrative law judge was obligated to ask counsel to obtain further explanation from Dr. Patch for the discrepancies between his first and second RFC assessments before outright rejecting the second one. Nonetheless, the duty to recontact a treating physician for clarification as to an RFC opinion is triggered only when (i) "the evidence does not support a treating source's opinion[,]" and (ii) "the adjudicator cannot ascertain the basis of the opinion from the case record[.]" *See* Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-5p"), at 127*; see also, e.g., Alejandro v. Barnhart*, 291 F. Supp.2d 497, 512 (S.D. Tex. 2003) ("SSR 96-5p does not say that ALJs must recontact a treating physician whenever the record as a whole

[8] What is more, Dr. Patch himself seemingly lessened the weight of his revised RFC assessment by proclaiming that he would expect significant improvement if the plaintiff were compliant with prescribed treatment. *See* Record at 277. Per relevant regulations, a failure, without good reason, to follow prescribed treatment that "can restore . . . ability to work" bars an award of benefits. 20 C.F.R. §§ 404.1530(a), 416.930(a).

(or a treating physician's particular contribution to the record) fails to support his opinions. To the contrary, SSR 96-5p requires recontact solely when both (a) the record fails to support a treating source's opinion, and (b) the basis of the treating source's opinion is unascertainable from the record. The ALJ does not express confusion regarding the basis of Dr. Igoa's opinion; instead, she concludes that the purported basis for his opinion does not lend any support to said opinion. This distinction is dispositive[.]") (citation omitted).

Here, as in *Alejandro*, the administrative law judge was not left in the dark as to the basis of the revised opinion: Dr. Patch stated that it derived from his review of previous physical therapy and back examinations. *See* Record at 277. Thus, no duty to recontact arose.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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